* * * in the domestic service of any family or person at his home" under Section 2(3) of the Act.

a. The Board, in its few decisions construing the domestic employee exemption of Section 2(3), has consistently focused on the employment relationship by examining the "principals to whom the employer-employee relationship in fact runs," or, in other words, who employs the workers. *Ankh Servs.*, 243 N.L.R.B. at 480. The Eleventh Circuit, the only court of appeals to review a decision involving the domestic employee exemption, previously affirmed a Board determination that the domestic service exemption does not cover employees who were not employed by individual condominium unit owners but were instead employed by the condominium association, a corporate entity. *NLRB* v. *Imperial House Condominium, Inc.*, 831 F.2d at 1005. The court observed that the Board's focus accurately characterized "the true economic relationship existing between the employers and employees." *Ibid.*[2] The court of appeals' conclusion here (Pet. App. 7a) is fully consistent with that precedent.

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[2] The very limited legislative history of the exemption supports the approach taken by the Board and approved by the Eleventh Circuit. In *Ankh Services*, the Board noted that Congress stated that it meant only to exclude "domestic servants" from the NLRA. 243 N.L.R.B. at 480 & n.17 (quoting S. Rep. No. 1184, 73d Cong., 2d sess. 1, 3 (1934)). The Board further observed that "Congress did not * * * elaborate on the term 'domestic servant' nor did it define the scope of any particular employment relationship it may have intended to exempt from the operation of the Act." *Ibid.* Nor did Congress indicate an intent to exclude from coverage "any other than those individuals whose employment falls within the commonly accepted meaning of the term 'domestic servant.'" *Id.* at 480.

b. Contrary to petitioner's claim (Pet. 9-11, 18), the Board's overruled decision in *Point East Condominium Owners Ass'n*, 193 N.L.R.B. 6 (1971), does not support its argument that the Board erred in finding the domestic employee exemption inapplicable to petitioner's employees. In *Point East*, the Board declined to exercise discretionary jurisdiction over a condominium association because the Board determined that none of its existing jurisdictional standards applied. In particular, the Board found that its standard for asserting jurisdiction over retail establishments was inappropriate for condominiums because the employer association provided no services to persons other than the owners, and therefore was not clearly engaged in the sale of a service. *Id.* at 6. See *Leisure Village Ass'n*, 236 N.L.R.B. 102, 102 n.3 (1978) (clarifying *Point East* as holding that the Board had not yet "established a standard governing exercise of its jurisdiction over enterprises engaged in managing and maintaining condominiums").

When subsequently presented with "an exhaustive collection of data and analysis" prepared by the Department of Housing and Urban Development showing the accelerated growth of condominiums and their prominent role as a housing resource, however, the Board concluded that condominiums "are engaged in the business of concerted home management and maintenance." *30 Sutton Place*, 240 N.L.R.B. 752, 752-753 (1979). The Board further found that "this business had a substantial impact on interstate commerce, warranting our assertion of jurisdiction," so that employees of condominiums and the entities themselves "when acting as employers, may invoke the rights and privileges of the Act." *Id.* at 753 (overruling *Point East* to the extent it was inconsistent with *30 Sutton Place*).

In reaching that conclusion, the Board reasonably determined that the domestic employee exemption did not preclude its assertion of jurisdiction, because there was a substantial difference between employment by a single homeowner, where an individual and personal relationship is created, and employment by a condominium entity, which is similar to employment at an apartment house. 240 N.L.R.B at 753 n.6. The Eleventh Circuit in *Imperial House Condominium* endorsed the Board's reasoning in the specific context of a condominium association incorporated under Florida law. 831 F.2d at 1004-1005.[3]

2. The court of appeals correctly rejected petitioner's suggestion (Pet. 17-18) that the decision in this case conflicts with this Court's decision in *NLRB* v. *Kentucky River Community Care, Inc.*, 532 U.S. 706 (2001). *Kentucky River* addressed Section 2(11) of the NLRA, 29 U.S.C. 152(11), which defines the term "supervisor," another category that Section 2(3) excludes from the definition of employee.[4] The Court held that the Board's

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[3] Petitioner relies (Pet. 13-15) on the dissenting opinion of two Board members in the Board's *Imperial House* decision, which advocated a return to *Point East*. See 279 N.L.R.B. at 1228. Even the dissent in *Imperial House*, however, recognized that nothing in the NLRA precluded the Board's assertion of jurisdiction over condominiums and disclaimed any argument that condominium employees are "domestic employees." *Id.* at 1228-1229.

[4] Section 2(3) provides that the term employee "shall not include * * * any individual employed as a supervisor." Section 2(11) states that "[t]he term 'supervisor' means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the

interpretation of the term "independent judgment," which Section 2(11) uses to define who is a "supervisor," to exclude a particular kind of judgment—namely, professional or technical judgment in directing less skilled employees—inserted a "startling categorical exclusion into statutory text that does not suggest its existence." 532 U.S. at 713-714. The Court also held that the Board's application of its definition only when such judgment was used "in directing" less skilled employees was directly contrary to the statutory text, which ties the use of independent judgment to twelve distinct functions, such as hiring, transferring, suspending, laying off, etc. *Id.* at 715-716.

Those determinations about the Section 2(11) phrase "independent judgment" have no bearing on Section 2(3)'s exclusion of individuals "employed * * * in the domestic service of any family or person at his home." Unlike in *Kentucky River*, there is no conflict between the language of Section 2(3) excluding individuals employed in domestic service and the Board's conclusion, affirmed by the court of appeals, that the exclusion does not apply to petitioner's employees.

3. The court of appeals also correctly rejected petitioner's constitutional arguments. See Pet. App. 7a-8a. Petitioner argues (Pet. 18) that applying the NLRA to its employees would "violate[] State sovereignty." As the regional director explained in rejecting that contention, however, the finding that petitioner's employees are covered by the Act does not prevent the organization of condominium associations or preclude individual con-

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exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment."

dominium owners from claiming the State's homestead exemption. Pet. App. 33a.[5]

Petitioner's contention (Pet. 21-22) that applying the Act to its employees would violate various constitutional provisions is also mistaken. For example, petitioner contends (Pet. 21) that a union might go on strike, and that such a strike would amount to a "taking" under the Just Compensation Clause or a "denial of due process, in violation of the Fifth Amendment (insofar as the NLRB would be authorizing such a result)." Pet. 22. None of the hypothetical situations petitioner posits (Pet. 21-22) appear to raise any constitutional issue. They do not involve state action and, for the most part, would not in any event constitute the kind of conduct forbidden by the Constitution. In addition, any now-hypothetical constitutional claims petitioner may have could be asserted if and when the strike or other union activity posited by petitioner in fact materialized. At present, all that is at issue is the recognition of the Union as the exclusive representative of petitioner's employees. There is nothing in that recognition that presents any constitutional issue.

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[5] Petitioner is mistaken (Pet. 19-20) in contending that *Federal Maritime Commission* v. *South Carolina State Ports Authority*, 535 U.S. 743 (2002), has anything to do with this case. In *Federal Maritime Commission*, this Court held that state sovereign immunity barred the Federal Maritime Commission from adjudicating a private party's complaint *against a state port authority* that the state-run port violated the Shipping Act of 1984. Petitioner is a private employer and not an arm of the State of Florida. Petitioner is therefore not entitled to state sovereign immunity.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2005